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BY

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PREFACE.

If apology or explanation is due for adding another contribution to the pamphlet literature of the day, it is to be found, if at all, in this. We are in the midst of war. Every loyal man believes that the contest will be soon ended with the suppression of a causeless rebellion. Everybody is, accordingly, discussing, what is then to be done with the "seceded States"? The difficulty in settling this grows out of the nature of our government. In deciding it, it is idle to indulge in theories which are not based upon the Constitution, the only recognized bond of the Union. In the following pages is an attempt, through the history and analysis of this instrument, to dispose of the question which lies at the bottom of the discussion, whether, and how far, a State *can* secede? If this is settled in one way, it disposes of most of the other questions which have been raised upon the subject. The only reward one

can propose to himself, for such a work, is the hope that it may aid some honest inquirer who has been able to devote less time to the subject, in determining, in the light of the Constitution, what may be done with the "seceded States" when the rebellion is crushed.

CAMBRIDGE, February, 1865.

SOVEREIGNTY AND SECESSION.

WE hear so many and such conflicting opinions, every day, upon the relative and respective powers and duties of the State and National governments, that an effort to reach some satisfactory solution of the questions involved in these discussions may not seem to be ill-timed, nor wholly destitute of interest, though the topic should prove to be trite, or, in its nature, dry and abstruse.

Theories of severing States from the Union.

The subject derives a new and additional interest from the condition in which the United States will, according to the theory of some writers, stand to the *seceded States*, in respect to their being in or out of the Union, when the rebellion shall have been crushed, and its armies no longer regarded as belligerents. If, as Mr. Calhoun insisted would be the effect, and many politicians of the North have also maintained, a State, by seceding, is out of the Union, or, to borrow the language of the former, such act "would place the State beyond the pale of her federal relations, and, thereby, all control on the part of the other States over her; she would stand to them simply in the relation of a foreign State, divested of all federal connection, and having none other between them but those belonging to the law of nations." The problem of a re-formation

or restoration of the Union is one of infinite difficulty and embarrassment.

If, to carry this thought a little further, the theory which some contend for is sound, — that the United States government was the creation of the several States, with limited powers derived wholly from these States, while each of them retained its own sovereignty as to all matters not expressly delegated to the United States, — it is not easy to see by what means the government of the latter could have acquired the power, or its equivalent the right, to dictate the course of any one of these States upon the subjects which it had thus reserved to itself. It would be making the thing created superior to the power which created it. The aggregate powers acquired would be greater than the sum of those, collectively, which had been conferred. If we assume, in order to give full force to the argument, that the States clothed the United States with sovereign and supreme power as to all subjects matter, of a national concern, which they originally delegated to the federal government, on what ground can it be maintained, as some seem to contend, that it should or might control or dictate what shall be, properly, the domestic policy of these States? If it is placed upon the ground that for any reason, such as a forfeiture for some breach or violation of condition or duty, some new compact may be imposed, into which the offending State may be compelled to enter before it is permitted to share in the care, protection, and benefits of the General government, it assumes that such State is in fact out of the Union; and the question then arises, on what ground any other State, or the United States, in its character of a body politic, has a right to complain, if such State chooses to remain separate and apart rather than to comply with the proffered terms? These questions are put hypothetically, in order to show to what the argument tends, and not with a view of sustaining a position which, it is hoped, the following pages will succeed in showing to be unsound and untenable.

Before, however, undertaking to consider the question in its more

direct bearing upon the mode and feasibility of *reconstructing*, as it is called, the Federal Union, one ought to understand upon what grounds the advocates for the right of secession rest their claims, in order that he may arrive at a satisfactory conclusion upon the matters involved in the controversy which these advocates have raised. This is the more necessary, from the earnestness and seeming sincerity with which many of its advocates insist that the solecism of a right in a State to secede from a part or the whole of its own people is to be found in the history and language of the Constitution itself. And this, it should be borne in mind, is something altogether distinct from what would be an act of revolution, which lies wholly outside of the Constitution, and does not enter into this discussion.

The Question to be considered, stated.

If the claims upon the one side or the other of this question are analyzed, it is believed they will be found to resolve themselves into this: Is the United States a sovereignty in itself, deriving its powers and functions from the people; or is it the minister and agent only of the several State sovereignties which coextend, geographically, with the limits of territory over which the government of the United States exercises its functions?

Difficulty in the Doctrine of Double Sovereignty.

The existence of a double sovereignty over the same extent or region of territory, to be exercised by two coördinate and mainly independent organisms of government, is difficult to be conceived of by those who have formed their notions upon the models of European monarchies. This is especially so to an Englishman, whose ideas of sovereignty in a government are borrowed from the oneness and omnipotence of Parliament. If he so far overcomes the difficulty as to solve the apparent mystery of the distinct sovereignties of the States, he is in danger of contenting himself with this step in the analysis, and of drawing therefrom the by no means necessarily legitimate inference that the ultimate

sovereignty of the larger body politic is resolvable into those of the several minor bodies which go to make up the larger one, so far as its geographical limits and relations are concerned.

Grounds of English Sympathy with Secession.

And it may be that we do an unintentional injustice to the English people in the indignation which has been so generally awakened, on the part of the loyal States, by the misplaced sympathy which the oligarchy of England have lavished upon the cause of the rebellion in this country, by not allowing for the error into which so many of them have fallen as to the character of the government under which we live. If — as the agents of that rebellion abroad have persistently urged upon the public mind through their willing organs, the English press — the contest in which we are engaged is an attempt on the part of a large State to coerce a smaller one, it perhaps should not be wondered at that a sympathy should have been awakened for the weaker party. But when we consider that such an assumption is utterly without foundation, or well-grounded pretence, it is often difficult to determine how far this sympathy of certain classes in England is the result of honest ignorance of facts which are accessible to all, or is but another illustration of that homely adage, "None are so blind as those who wont see."

How far ignorance may serve as an apology for those of our neighbors just across the line, who pretend that invading the soil of Vermont by an armed force, and robbing, plundering, and murdering her citizens, is not an infringement of the sovereignty of the United States, because Vermont is herself an independent State, is a question which those, who can suppose such ignorance to exist, may perhaps be prepared to answer.

We have been led to speak the more freely of this from having become satisfied that there were honest and even profound writers in England, who have failed to master the seemingly complex character of our State and General governments, by

mistaking the relations of sovereignty between them. Such was the case, we conceive, with the late Mr. Austin, the learned and able professor of jurisprudence in the London University. In the sixth lecture in the first volume of his works he attempts to explain the operation of what is so familiar to almost every one in this country, — the check and limitation to legislation which is found in the existence of a fundamental law or constitution; and, in the next place, the character of the General and State governments and their relations to each other, in which he is either unfortunate in his use of terms in conveying his ideas, or he found it a problem which he was unable to solve. He ventures, however, to go no further than a *belief* on his part that he may have been right, when he states, as his own doctrine, upon one page of his work, what is substantially the dogma of secession, and on the next assumes that the ultimate sovereignty of the United States, considered as a whole, is made up of the ultimate sovereignties in the people of several States, taken collectively and in the aggregate. We refer to the views of this writer, as we gather them from his lectures, with no wish to add anything to their vagueness and indistinctness, and are willing, from his experience, to suppose that there may be a difficulty, in the mind of a stranger to our system, to comprehend clearly the nature as well as forms of our government. But a writer in the "London Law Magazine" of February, 1864, who maintains the doctrines of secession to the utmost, is certainly not obnoxious to the charge of not being sufficiently definite and outspoken; and having, as he does, access to the pages of the leading law periodical in the kingdom, he may be supposed to speak for a class, and to follow, with few exceptions, the tone of the English press.

The writer had contributed an article to the same work, in August, 1862, which was replied to, with great candor, learning, and ability, by Judge Redfield and Mr. Hillard, of Boston, in the same work. The article first mentioned was in reply to those, and covers between thirty and forty pages. And if we were at liberty to exer-

cise the Yankee privilege of guessing, from the intrinsic evidence which the article carries with it, we would venture to assume that its writer acquired his notions in the Calhoun school of politics on this side of the water, and never saw Westminster Hall until he went abroad to enlighten our English cousins in the philosophy of South Carolina secession.

He sums up his conclusions thus: "That the American Union is a federation of sovereign States; that this federation was established by an instrument called the Constitution; that this instrument is a compact or convention between the States, the purpose of which was to establish and lay down rules for the Federal government; lastly, that the States, being sovereign and coequal, have no common superior as arbiter in their disputes, and that, consequently, each may secede from the federation whenever it thinks proper. Such act of secession can only be a *casus belli* as to the rest, certainly not of rebellion. Moreover, the Federal government, as the delegated representation of the federation, is purely subordinate thereto, and the sovereign powers with which it is invested must be viewed in reference to this fact." And, in referring to the sovereignty of the States, he remarks: "If the States be sovereign, to suppose a sovereign over them would involve a contradiction of terms. A federal government of a federation of sovereign members does not involve this."

Mr. Calhoun's Doctrine of "Federation."

In this doctrine of a "federation of sovereign members" lies the foundation, as we conceive, of the whole heresy of secession. In considering the States, as they clearly are in some things, sovereign, this dogma holds them sovereign in all things,—which, as clearly, they are not.

But we have assumed that the doctrines here expressed are but a repetition and a restatement of what Mr. Calhoun maintained and asserted more than thirty years ago. He did this although the recorded declarations and opinions of the framers of the Constitution

and their cotemporaries — as well those who favored as those who opposed its adoption — were to the contrary; and one chief ground of objection which was insisted upon was that it was not a federation, but, in the language of one of these, — Mr. Mason, of Virginia, — it was "one general, consolidated government" (3 Elliot's Debates, 33); and of another, — Patrick Henry, — "that this is a consolidated government, is demonstrably clear." (Ib. 22.)

In his published letter to Gov. Hamilton, under date of August, 1832, a short time previous to the Nullification Convention in South Carolina, Mr. Calhoun, then Vice-President of the United States, enunciated, as it were *ex cathedra*, and as a guide to the people of that State in the step they were about to take, the doctrine "that the Constitution is the work of the people of the States considered as separate and independent political communities; that they are its authors, — their power created it, — their voice clothed it with authority; that the government it formed is in reality their agent; and that the Union of which it is the bond is the union of the States and not of individuals." "The government, then, with all of its departments is, in fact, the agent of the States, constituted to execute their joint will, as expressed in the Constitution." "However dissimilar their governments, the present Constitution is as far removed from consolidation, and is as strictly and purely a confederation, as the one it superseded. Like the old confederation, it was formed and ratified by State authority."

It cannot be profitable to follow out the train of argument, which he attempts to draw from assumptions like these, in favor of his darling doctrine of nullification, whereby he assumes that a State may nullify any act of the General government which affects her, and yet remain an integral part of the Union. There was no occasion, in his view, for a State to secede from the Union, though he admits its power so to do, and that it is a question of expediency and not of right.

These doctrines thus early propagated, though still earlier planted in certain sections of our country, have brought forth the bitter

fruits of rebellion, under which the energies and resources of the republic are now being wasted.

The United States Government a Distinct Sovereignty.

It is not proposed to show, as might easily be done in the light of history, how ill-founded and absurd such doctrines as are here maintained ought to be regarded, but to endeavor, by analysis and comparison of the powers of the State and General governments, to establish the proposition that the government of the United States is, in itself, an entity as one, as independent and as sovereign, as to the subjects matter confided to its charge by the people who created it, as the government of any or either of the States existing within the territorial limits of its jurisdiction.

To do this requires that we should begin with the elementary principles of government, and settle, in the first place, definitely and distinctly, what is meant by *sovereignty* and *independence* as applied to a State, or the government which it may have adopted. If we could suppose a certain number of individuals coming together in a state of nature, we might predicate personal sovereignty and independence of each of these in respect to the others, simply because neither could rightfully exercise any command or restraint over the other. One might, indeed, by superior physical power or cunning, prevent another from enjoying entire freedom of action or will. And the fact that such a power may be exercised by the strong over the weak, and the wise over the simple, might be supposed to have furnished the original hint of a need of mutual aid and protection by means of organized civil society under some form of government, if a still stronger motive were not found in the nature of man as a rational and social being.

The inference which naturally results from these simple truths is that the powers of government are strictly derivative, and that, with whatever of sovereignty a government may be clothed, such sovereignty is but the aggregate of what the individuals of the State, which may have formed it, gave up upon entering into the relation of civil society with each other.

What is meant by Sovereignty.

In seeking to define what we are to understand by sovereignty as applied to the constitution of a State, reference is to be had not only to the language of elementary writers upon public law, but to the Constitution itself, together with opinions which our courts have had occasion to declare when considering the nature of the Constitution and the powers it embodies. Some of the more familiar of these principles are stated in the words of the courts and writers referred to. Burlamaqui is full and direct upon the point, although he probably never conceived of a system of government comparable with ours for the complicity of its parts and its powers. "As to sovereignty," says he, "we must define it, the right of commanding civil society in the last resort, which right the members of this society have conferred on one and the same *person*, with a view to preserve order and security in the commonwealth." And he defines "person," as thus used, to be "not only a single man, but likewise a multitude of men united in counsel and forming one will by means of a plurality of suffrages." (Vol. I., pp. 31, 32.) "It must therefore," he continues, "be agreed that sovereignty resides, originally, in the people, and in each individual with regard to himself, and that it is transferring and uniting the several rights of individuals in the person of the sovereign that constitutes him such, and really produces sovereignty." (pp. 39 and 97.) "This sovereignty, such as we have now represented it, resided originally in the people." (p. 48.) He then considers the effect of a people "transferring their right to a sovereign," and supposes the case of distributing the powers of sovereignty between different *persons*,—as where the people should retain the legislative power, a king should be clothed with military and executive powers, and to a senate should be delegated the judicial functions of such a government. (p. 61.) And he enumerates some of the more important powers which go to make up the idea of sovereignty,—such as that of making laws; that of coercing their observance; that of judiciary, including the power of

pardon; that of raising armies for the safety or defence of the state, and of making peace, entering into treaties and alliances with other States, and of laying taxes and imposts, together with that of coining money. (pp. 64–68.) And whoever will take the trouble to look at the Constitution of the United States, will at once perceive how many of these powers are expressly conferred upon the government constituted under it, and at the same time withdrawn from the governments of the several States. Nor can we be at a loss to see that whatever powers emanate from the ultimate sovereignty of a people may be variously distributed among different functionaries and agencies, upon whom they may see fit to confer a share, more or less extensive, of the aggregate sovereignty which they had collectively at the outset. Judge Sharswood, in his edition of Blackstone, in commenting upon the definition of sovereign power as given by the latter, says: "The sovereignty or sovereign power in every State resides, ultimately, in the body of the people." "The powers of government are not strictly *granted*, but *delegated* powers." "The act of the people which constitutes the form of government, we call the constitution." (p. 49; note.) Vattel says of *sovereignty*, that it "is that public authority which commands in civil society, and orders and directs what each is to perform, to obtain the end of its institution. This authority belonged, originally and essentially, to the body of the society to which each member submitted and ceded the rights he received from nature to conduct himself in everything as he pleased, according to the dictates of his own understanding, and to do himself justice." (B. 1, ch. 4.)

The elementary principles upon which the line of distinction between the sovereignty of the United States and of the several States in the matter of government is to be maintained, have repeatedly been made the subjects of consideration by our courts, both State and Federal, and may be taken to be settled, so far as any question in jurisprudence can be regarded as determined. One or two only of these opinions need be cited at any length, to show what their tenor is. In one case (1 Wheat. R. 325), the

language of the Supreme Court of the United States is: "There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the State governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either." And when we come to examine, historically, what was actually done in the formation and adoption of the Federal Constitution, it will be found to correspond in all respects to what is here supposed. Chief Justice Marshall, in speaking of the United States as a government, says: "This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited, but, while within those limits, it is a perfect government as any other." (2 Brock. Rep. 109.) And the doctrine here laid down will be found to apply in other parts of the investigation upon which we are entering.

Chief Justice Field, of the Court of California, now of the Supreme Court of the United States, has defined the relation of the States to the United States, in the matter of sovereignty, in as clear and summary a manner as it can be well done. "In this country, this authority" (the supreme political authority in a State) "is vested in the people, and is exercised through the joint action of their Federal and State governments. To the Federal government is delegated the exercise of certain rights or powers of sovereignty, — and with respect to sovereignty, rights and powers are synonymous terms; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the

people of the respective States, or vested by them in their local governments. When we say, therefore, that a State of the Union is sovereign, we only mean that she possesses supreme political authority, except as to those matters over which such authority is delegated to the Federal government, or prohibited to the States. In other words, that she possesses all the rights and powers essential to the existence of an independent political organization, except as they are withdrawn by the provisions of the Constitution of the United States." (17 Cal. Rep. 218.)

How the States became Local Sovereignties.

The inference to be derived from these various fundamental principles of political organization and government, when applied to these American States, seems to be this, — that when the people of that district of territory, which afterward assumed the character of a State, saw fit to create a government to control and manage their affairs, they were at liberty to delegate to this government such powers and in such form as they chose. They might call its chief magistrate a president, and clothe him with one degree of power, or a governor, or a pacha, with powers less or more extended, as suited their tastes or their notions of expediency. They might provide for the appointment of their judges by an executive officer, or reserve the election of these officers to themselves. They might have delegated the powers of legislation to a Senate and House of Representatives, as in New Hampshire; or to a single body, like a House of Representatives, as was originally done by the people of Vermont. Nor would there have been any difficulty in blending the people of two or more of these districts into one body politic, by an exercise of united sovereignty on the part of those interested, as was done in the case of Plymouth and Massachusetts, or Hartford and New Haven, while colonies of Great Britain; or, to go back to an earlier illustration, at the time of the union of the people of England and Wales by the act of Henry VIII. So there might, with the same degree of consist-

ency, have been a limited or qualified union of the people of two of these districts, where each should have given up a portion only of their original sovereignty, while they severally retained what remained, as the people of England and Scotland did in 1707, when, notwithstanding the union of the two, Scotland retained its original system of municipal law, which even Parliament was prohibited from abrogating, to the sacrifice of private rights.

But, without speculating any further upon what might have been done by the people of these States, let us see, in the light of history, what they in fact did do in this very matter of granting or retaining the rights of sovereignty, which, it is admitted on all sides, they once possessed.

The colonies, though acknowledging the crown as the source of their political power, were, severally, bodies politic, and formed integral parts of the British empire. The limitations under which they exercised portions of sovereign power were not uniform, nor altogether over the same subjects matter. Massachusetts, for instance, was at one period practically sovereign and independent in everything but in name. At another, she lost a considerable part of this, under her second charter which the crown forced upon her. The consequence was, that when the revolution of '75 had been so far consummated as to lead the people of these colonies to declare their independence of the British crown, they found themselves, practically, divided by territorial lines which had served to designate their several colonial jurisdictions; and, by a kind of necessity, the people of these several localities from that time assumed the exercise of original sovereignty within their recognized limits. Yet, who ever supposed that the declaration of American independence was the *corporate* act of Rhode Island, New York, or Virginia? It was the *people* of all these late colonies, collectively, by a joint act, who made that declaration through their delegates, and who published and proclaimed it "in the name and by the authority of the good people of these colonies." In a discussion in the Legislature of South Carolina, in 1788, as quoted by Elliot, in his "Debates,"

this language, by Gen. Pinckney, is found: "This admirable manifesto sufficiently refutes the doctrine of the individual sovereignty and independence of the several States. In that declaration the several States are not even enumerated." (Vol. I., p. 66.) When they assumed their political organizations, they did so in reference to their prior territorial divisions, and with a view to a more ready and effectual coöperation with each other as parts of one nation. Thus we find that Massachusetts, who had not even had the form of a government, beyond a voluntary convention of her citizens, from October, 1774, to July following, under the advice of Congress adopted the form of government to which she had been accustomed while a province, with the exception of substituting an executive council in the place of a single executive head.

In this way the people of the several States became, like those of the colonies, independent of each other in the management of their own affairs, and each adopted for themselves such form of government as they chose. While the people of New Jersey and Virginia saw fit to form a new constitution of government for themselves as early as July, 1776, those of Massachusetts went on under the old charter with slight modifications, until 1780, and the good people of Rhode Island were content to retain that which had come down from the days of their charter, until 1842.

It was, after all, simply the circumstance that the people of the several colonies had been accustomed to act together, politically, while subject to the crown, which determined their preferences in fixing the limits of their municipalities. Nor was there anything in the nature of their relation to each other, that rendered a division into larger or smaller territories, originally, either inconsistent or incompatible with their acting in harmony with each other as a whole. It was nothing more nor less than the people of these distinct municipalities taking upon themselves to act, through the instrumentalities of the governments which they formed for themselves. And in some cases they were careful to declare this, as was the case with New York in the constitution of her government:

"No authority shall, under any pretence whatever, be exercised over the people or members of this State, but such as shall be derived from and granted by them." So the Bill of Rights of North Carolina opens with the declaration "that all political power is vested in and derived from the people only." And the fifth article of the Bill of Rights of Massachusetts, starting with the assumption that all power resides, originally, in the people, and is derived from them, declares all magistrates and officers of government to be "their substitutes and agents, and, at all times, accountable to them."

But it is unnecessary to dwell any longer upon propositions which most people now are willing to accept as elementary truths; and it is only in their application to the subject as we proceed that they have been so fully stated.

How far the Confederation was a Union of the States.

The war of the Revolution had been in progress but a short time when it was perceived that some stronger bond of union and more efficient principle of coöperation between those who were struggling for independence was wanting than a mere congress of delegates with only advisory powers. Articles of Confederation were accordingly framed and adopted in Congress in July, 1778, and were successively ratified by the delegates of the several States between that time and March, 1781, when the last of the States assented to the terms.

In that instrument each State, in express terms, retained its "sovereignty, freedom, and independence." Nor did the States, thereby, pretend to do anything more than "enter into a firm *league* of friendship with each other, for their common defence;" and in the decision of all questions each State had a single vote.

The fate of that confederacy, as an experiment, is a matter of history. In the attempt to carry it out, the nation found itself on the verge of irretrievable ruin; when, as a last resort, it was proposed to hold a convention of delegates "for the sole and express purpose of revising the Articles of Confederation." The alterations

that might be made were to be reported to Congress, "agreed to in Congress, and confirmed by the States." The terms upon which this convention was called, as above cited, are worthy of notice, as marking the entire departure by that body, in their final action, from the line originally pointed out to them in their appointment.

How the Constitution was formed.

This convention met in May, 1787, and the result of their labors was the preparation, after great deliberation and a most full and able discussion, even to its minutest details, of the instrument afterwards adopted as the body of the present Constitution of the United States. A comparison of its concessions and limitations with those of the Articles of Confederation which it was designed to supersede, ought to satisfy any one that, what its framers and those most familiar with its history uniformly maintained, the convention found it necessary, in order to meet the exigencies of the country, to devise, arrange and carry out into detail, a new, independent, and entire plan and system of government, expressly designed and adapted for one people or nation. This was to be made up of the several peoples of the then existing and prospective States which were then, or should thereafter, be recognized as parts of that whole, to which the name of "United States" was to be applied. The old confederation was abandoned. Not a word is said in the Constitution of its having anything to do with "State sovereignty," except by expressly declaring that the powers of the States not thereby "delegated to the United States nor prohibited by it to the States, are reserved to the *States respectively*, or to the *people*," — thereby recognizing the distinction which is important in construing this instrument, between the "States" considered as bodies politic, and the "people" of whom such States are composed.

The system of government thus devised, was, moreover, complete in itself, in all its departments, — legislative, judicial, and executive; and powers were moreover given to it adequate to a complete exercise of all the functions of administration, the only limita-

tion being in respect to the *subjects matter* over which it might exercise its agency or entertain jurisdiction. And here the limitation was evidently intended to be definite and distinct. But there is not a word said in the whole instrument of any appeal to any higher power than is found in the government itself, to correct or control its action, within the limits of its jurisdiction, except it be done by way of amending the instrument itself. In other words, this system of government, in respect to *all subjects matter* "*delegated to the United States*," is as *sovereign* and *independent* as these terms can be predicated of any government which a people can form for themselves.

But it should be remembered that when it came from the hands of the convention, it had no obligation or binding force whatever. It was at best but a recommendation made to the people in the form of a report to Congress.

It was, morever, recommended "that it should be submitted to a convention of delegates chosen in each State *by the people thereof*, under the *recommendation* of its Legislature, for their assent and ratification." It did not contemplate any legislative enactment; and the reason for recommending legislative action upon the subject on the part of the States to the extent they did, will be obvious upon a moment's reflection. In the first place, it was the readiest way of devising the means for the calling of conventions, and giving opportunity to the people of the States of choosing the delegates who should constitute them. In the next place, the instrument to be acted upon proposed to withdraw from the State governments sundry powers which they had hitherto exercised; and the people having clothed them with these powers, it might be objected, if the people should undertake, by a direct vote, to confer upon a new government any part of what they had already delegated to their own local government, that they were transcending the constitutional limits which they had previously fixed for themselves. Whereas, if the Legislatures of the States saw fit, in accordance with such a recommendation, to call such conventions, and authorize the

people to elect delegates to act upon the adoption of the framework of the new government, both they and the people would be acting in unison upon the matter thus submitted to them. The State governments would be assenting to the surrender of whatever of sovereignity the people might see fit, by adopting the Constitution, to withdraw from the government of the State, and confer it upon that of the United States.

Again, upon the question whether the people of any State should withdraw a portion of that sovereignity with which they had clothed their own government, and by a concurrent vote with the people of the other States, confer it upon the government which was to embrace them all, — it was obviously proper that the people of each State should act independently, within their own jurisdiction, in order to prevent their being controlled by majorities in other localities. The people of New York and Pennsylvania, upon an original question of absorbing the interests of other localities under one government, ought not, upon any rules of equal right, to have exercised control over the action of the people of Rhode Island or Connecticut by the mere force of numbers.

How the Constitution was ratified.

The result of this recommendation, made by the convention to Congress, was, that Congress complied with its suggestions, by transmitting the report of the convention to the several Legislatures, to be submitted to conventions of the people. The several Legislatures, thereupon, made provision for the election, by the *people* of their respective States, of delegates to represent them in these conventions. And, after a most searching and earnest discussion of its merits and defects, these peoples of the several States resolved to adopt the instrument, with certain amendments, and to withdraw from the cognizance of the local governments certain specific subjects matter, and to confer jurisdiction over them upon the government which that Constitution was to create and vitalize.

The Constitution created the United States a Sovereignty.

This, when analyzed, is a simple summary of the process by which the change was wrought in the relations of the people of the several States to the whole body of the people of all these collectively, in the matter of a single government for the whole, in which the sovereignty residing in the entire body of the people of the United States was exercised in framing a government to which was delegated the several powers enumerated in the Constitution. The question which had been submitted to the several peoples of the respective States, and by them deliberately acted upon, was whether, as to certain subjects matter of a purely national character they were willing to act as *one nation*, becoming, for that purpose, the integral parts and members of one body politic, including the territorial limits of all the States, while, in all other respects, they should remain separate peoples as to their own domestic or municipal affairs? They found a ready analogy for this general and local relationship in every State in the Union, in which the people of a town or county, while managing the local affairs of such town or county, were also equally members of the larger body, the State.

The Constitution the Act of the People, not of the States.

The extent to which this analysis of the process by which the people of the already existing States created a new independent government, has been carried, may seem unnecessarily tedious and minute. But the reason for this is readily found in the persistent efforts on the part of the advocates of secession to establish the theory of State rights, upon which they rest their cause, which assumes that the Federal Constitution was the act of the State governments in the exercise of State sovereignty. Whereas, so far from this being, in any measure, true, we have failed to discover a single act of any State bearing upon the matter, beyond taking measures to have the whole subject submitted to the people of such State to act upon through their own special agents elected by them-

selves. The process by which this was accomplished may, at first sight, seem complex and not easy of explanation to one who has not given thought to the subject. There does not seem, however, to be any more intrinsic difficulty in thus forming a new government by the combination of the sovereignties of two or more communities of people, than there was in clothing the peers of Scotland with a portion of the sovereignty of the people of England, by extending the jurisdiction of Parliament over the united people of both, or in merging the various peoples of Italy, in our day, under the sovereignty of the kingdom of Italy. The acts by which these were done were voluntary, and not that of a conqueror over a conquered people. It may not be easy to explain, in view of the difficulty of reconciling the jarring interests of men, as we find them in masses, how the giving up, at first, of a part of their sovereignty to their government, by the people of any region or district, can be supposed to have been accomplished, and a civil body politic or State thereby created. Nor can we readily trace how it is that the people now upon the stage are supposed to have surrendered so much of their individual rights of original sovereignty, by the act of their progenitors when establishing a government a hundred or a thousand years ago, as to bind them thereby to submit to what they had no voice in establishing. The most that can be said is, it is a fact. People can create governments, and they do create them, and, when created, they and the generations that come after them are bound to submit to them till others are substituted in their places.

Why, therefore, should we seek to go behind the fact, which no one denies, that here, in the year of grace 1788, the people of the United States voted upon and adopted a form of government, with all the known attributes and elements of sovereignty and independence, and one whose powers and functions were carefully limited and defined by the very instrument which had been submitted to their approval under the name of a "Constitution for the United States of America?" Or why should we go beyond

the terms of this instrument itself, to ascertain what this government is and what are its powers and limitations?

The Powers given by the Constitution supreme.

If we now look into this Constitution, we nowhere find the first allusion to any power outside of those which it creates and delegates to the government which it establishes, which can revise or control the action of this government within the limits of its jurisdiction. Its only provision bearing upon this point is that which contemplates amending its terms in the manner prescribed in the instrument itself. In this light, nullification becomes simply absurd. It is claiming for a State not only the right to exercise the sovereignty which its people have already delegated to another government, but a power, through a limited, delegated agency, superior to and more unlimited than that which embraces not only the power of its own people, but that which emanates from the people of all the States united. And as for regarding this as a *confederation* of the States, it would be imputing an extreme of folly and madness to the men of that day, of which no one can conceive them guilty, to suppose they intended to escape the ruinous consequences of one confederation by substituting another equally friable and weak.

A State cannot secede from the Union.

When we come to consider the subject of secession from the Union on the part of any one of these States, the inquiry presents itself, not only whether they have the right so to secede, but whether they can effect it in any way short of a revolution? It was the doctrine of Mr. Calhoun, that, though force might be employed against a seceded State, "it must be a belligerent force, to be preceded by a declaration of war, and carried on with all its formalities." Others, who would repel the imputation of being disciples of Mr. Calhoun, nevertheless insist that as soon as a State has seceded she is out of the Union, — some say as a hostile State,

others as a territory, — and can only be received back in the manner of originally admitting a State formed out of territory acquired by conquest or purchase.

The error in both these classes seems to arise from misapprehending what a State is, and what are its functions and the relation in which, through its government, it stands to the United States.

If the views thus far taken are well founded, a State, as such, can neither be in the Union nor out of it, except so far as relates to its geographical limits. That artificial *person* the body corporate of New York, for instance, can, in no sense, be acknowledged as a part of the *people* of the United States, made up, as these are by the very meaning of the term, of natural, individual persons. A State may go on executing its municipal powers and functions over its schools, its highways, and the support of its poor, without, in any manner, affecting the functions of the United States government. It may, indeed, refuse to exercise that agency through which the people of such State take a part in the administration of the government of the United States. It may refuse to district its territory for the election of members of Congress, or it may forbear to choose its senators. But the utmost that could result from this would be to suspend the action of so many of the people of the United States as lived within its borders, in the measures of the Federal government. Was it ever pretended that New York would lose all right, thereafter, to be represented in the Senate of the United States, if she failed to elect a senator, from any cause, when a vacancy in her representation had occurred?

It matters not, whether a State is limited as to its jurisdiction by the subjects over which it has cognizance, or by the boundary lines of its territorial sovereignty. The one forms as definite a limit of its action as the other. Massachusetts could not fix the rate of interest in Rhode Island, nor bind New York by a tariff of tolls which she might prescribe for the Erie Canal. Nor could she, through any act of her government, bind her own citizens to a measure of secession, for the simple reason that her action, in either of these

cases, would be equally and alike outside of and wholly beyond any power with which her government was clothed. She would, for such a purpose, have no more efficient rights of sovereignty within the limits of her own territory than she would within that of Rhode Island or New York.

A Resolution by the People to secede inoperative.

It will be seen, therefore, that there can be no secession by any body, unless it be by the people themselves from themselves, — the people living in one part of the territory embraced within the United States seceding from those living in other parts of it. And inasmuch as there is one government over them all, which was created by the united act of sovereignty of every part, no part of this people could effectually resume their original sovereignty by any means short of a successful revolution. Nor does it make any difference whether this be attempted in the corporate name of a State, or of a county, or by the direct action of individuals without the form of an organization. And it is worthy of remark that the leaders of the rebellion seem to have recognized this want of power in State governments to withdraw States from the Union, when they caused whatever was attempted in that direction to be done through conventions of the people of the so-called seceded States. Such, too, was the character of the nullification ordinance of South Carolina in 1832. We do not propose to consider under what circumstances any part of a people may undertake or carry forward a revolution, because nobody places the cause of secession on that ground. But short of that, we see not, how the people of any locality can secede from the Union. So far as the United States are concerned, those who live along the shores of Massachusetts, or Delaware, or Chesapeake Bay, are not the people of Massachusetts, or Delaware, or Maryland, any more than they are the people of the United States, "however bounded." In this sense, citizenship is not local. The citizen of New York is just as much a citizen within the limits of Ohio, or North Carolina, as he is within the city of

New York itself. Upon the same principle, a mere majority of the people of a State could not, by influencing their agent, the government, to refuse any longer to recognize the relation of such State to the Union, change the national status of the whole of its people. The fact that any number of individuals, large or small, who should see fit to repudiate the obligation of citizens to the United States, happened to live in one locality or another, could not change their relations of responsibility to its government. They are its citizens and its subjects just as much, whether a part of them live in Vermont, a part in New York, and a part in Massachusetts, as if they all lived in one State and one county, or were scattered through twenty different States. Each is a traitor, or conspirator, or rebel for himself, whether acting separately or by a coöperation with others in a formidable array of "artillery and armed men."

Or, suppose the people of a part of three contiguous States, constituting a defined space of territory, and forming together a larger population than that of either of the three States separately, should come together, and, in the most formal and solemn manner, resolve to withdraw from the Union,— in other words to *secede*, — would they, thereby, cease to be a part of the people of the United States? And if, sick and ashamed of their folly, they should, at the very next congressional election, conclude to vote within their respective districts, could they, by any known law, be excluded from the ballot box? Much less could they, by their action, affect the rights, as citizens, of their neighbors who had refused to coöperate with them. And if this territory were limited by the boundaries of a single State, instead of forming parts of three, how could it change the effect upon the political status of those living within it, from that which we have supposed would be the case upon the first hypothesis?

Acts of Treason not a Secession of the People.

If, now, we pass from acts of disclaimer to those of actual hostility against the General government, — such as firing upon the national flag, plundering and stealing from the public stores, or seizing the

forts or arsenals of the United States by force, — and if we assume these to be done in the names of one or more of the States, we come directly to the question, which has been so much discussed of late, whether such States do thereby put themselves out of the pale of the Union, or not? In this connection, we are reminded that the so-called Confederate States are, and have been for three years or more, recognized by foreign States as belligerents in the war which they are waging upon the Union, and that even the United States, without any such formal recognition, deal with them as belligerents.

The difficulty which many find in grappling with the questions here involved, grows out of the wide extent of territory over which these acts have been carried on, and the vast numbers engaged in them. Nor can we derive any light upon the question, in its political bearing, from the action of foreign States, whose judgments, coinciding with their wishes, are wholly *ex parte;* nor from the fact that the United States have yielded to the claims of humanity in treating with the leaders of the armies of the rebellion as belligerent enemies, by exchanging the prisoners taken in arms, instead of hanging them as traitors.

In this, however, no regard has been had to the rebel States as sovereignties, nor is it doing any more than England did with her revolted colonies while she yet held them as rebels and traitors to her government. But if we look behind this array of numbers, — this flaunting of banners and boast of independence yet to be achieved, — what do we find? Simply this: the people, or a portion of them dwelling in certain localities, — for it is confidently asserted that in some of the States it was a minority in number only of those who acted, — saw fit to come together, by their delegates, and resolve to withdraw, or, technically, to *secede* from the Union. If this did not, *ipso facto*, exclude them from the Union, and sever the, till then, existing connection between them and the remaining people of the United States, did the fact that fifty or fifty thousand of them traitorously took up arms against the government

which they, together with the rest of the people, had clothed with the powers of sovereignty, carry them out of the Union, or destroy their connection of citizenship with it? If doing this by one person would not work a secession as to him, how many must do it in order to have that effect? And if such an act in individuals is a crime, whether acting singly or together, upon what principle should the punishment which ought to follow upon the heels of transgression, be visited upon the innocent, for happening to dwell in the vicinity of the transgressor? Why should the people of Eastern Tennessee be disfranchised because a majority of those in Middle or Western Tennessee, willingly or unwillingly, took up arms against their legitimate government?

Nor is it easy to see any more reason for doing this because the men in these localities have seen fit to carry on their acts of treason through the instrumentalities of their State governments, than if they had done so by the means of the organizations of their counties, or the machinery of State conventions. The sheriff of a county has just as good a right to wage war upon the United States as the governor of a State. These organizations of State governments are retained for altogether different purposes, and are clothed with altogether different powers, than those of directing or controlling the action of the government of the United States. In other words, they have no jurisdiction in such matters, and can neither will nor act in respect to them, any more than a State can declare war against England, or create a title of nobility, or do any other prohibited act, or resume jurisdiction over the lands which it had long since ceded — as in the case of Virginia and other of the States — to the United States.

Congress cannot exclude a State from the Union.

In whatever light, therefore, we look at the question, the conclusion seems to be irresistible, that those who are waging war against the United States cannot and do not act in the capacity of bodies politic, and that whatever the punishment may be to which they are

obnoxious, it can only be visited upon them as individuals, and not upon the masses indiscriminately who may happen to be within the same localities.

No State, as such, we repeat, is or can be out of the Union. And whenever a sufficient number of the people within any of these States, who are citizens of the United States, and are acting in harmony with the people of the United States, are willing to unite, in conformity with the Constitution, as good and peaceable citizens, in sustaining and coöperating with that government which the people adopted in 1788, it is not easy to see any reason, in or out of the Constitution, why they should not be allowed to do so. And, if it is asked, how it is to be ascertained whether, in any given instance, the people of a State have acted in this manner, when undertaking to elect senators or representatives to represent them in the Congress of the United States, — the answer is, it is to be proved like any other fact, and the Constitution itself, anticipating as it were this very contingency, has made each house "the judge of the election, returns, and qualifications of its own members." Let us suppose that instead of ten States, the major part of the people of Delaware had gone into rebellion, and after a year's struggle, so many of them had been killed or emigrated, that a decided majority within the State were found to be thoroughly loyal, and desired again to enjoy their rights and privileges as citizens of the United States. Would any one insist that, before they should do this, they should go through the ordeal of a purgatorial state of being treated as a territory, with the necessity of framing a constitution, and having it approved by Congress, and of coming back into the Union, if at all, by the favor and indulgence of the people of the other States? — and this, though the people who are thus subjected to this ordeal, may have supplied the very men and arms by which the rebellion had been subdued? And if such a preliminary measure would not be resorted to in the case of the people of a small State, upon what ground could it or should it be insisted on, if portions of the people of two or even ten States, who had been thus guilty of rebellion,

should make a voluntary submission to the government, and give satisfactory evidence of an intention and desire to adhere to the Union, and to share in its privileges and its burdens.

To prohibit Slavery in a State requires a Change in the Constitution.

If it is objected that a doctrine like this might lead to the restoration of States to the Union with the curse of slavery still adhering to them, and that, therefore, it should not be entertained, the answer is, that a consideration of political expediency or convenience is not to outweigh that of constitutional right. Pregnant as we should conceive the perpetuation of slavery to be of all sorts of political mischief, it is not to be got rid of under the Constitution in any other than a constitutional manner. And while the sooner this can be done the better, — and until it is done no one can count the Union safe, so long as slavery owes its existence to an exercise of local sovereignty on the part of the States, and is purely a local institution, dependent upon the sovereignty of the body politic in which it exists, — it is not easy to discover in what part of the Constitution of the United States the power of regulating or controlling it at all, in a time of peace, is to be found. Fortunately for the future of the republic, the Constitution has provided a way in which the people can remedy this evil without any questionable exercise of power, — and that is by amending the Constitution.

If slavery was so far made the subject of constitutional cognizance by the people of the United States as to find a place in the compromises of that instrument, in fixing the ratio of representation and the apportionment of direct taxes, and also in requiring the people of one State to surrender so much of their sovereignty as not to have a right to protect the slave that sought refuge from his bondage, it would seem too late to question the right in the people to adopt the principle of amending that instrument in respect to this as well as other subjects embraced within its provisions. It is in this way, and in this only, that a uniform rule can be provided, applica-

ble alike to all the States, and an end thereby put, for all time, to a possibility of reviving that which has been the almost fatal element of mischief in our country. It would hardly come up to the dignity of political sagacity to insist upon the insertion of a clause excluding slavery into the constitution of a State before recognizing her as again within the Union, if she were at liberty, the moment she was thus recognized, to change her constitution, and again legislate it into being. The people, we believe, are ready for a measure which shall forever exclude slavery from the United States, now that Congress has done its duty by taking the initiatory step. And the people can afford to wait a few months to have this done effectually and forever.

The States sovereign in Domestic Matters.

In one thing I am anxious that there should be no misapprehension of my meaning. While I have attempted to analyze the Constitution, with a view to establish the fact of the sovereignty and supremacy of the United States, in respect to every subject matter delegated to its government, I would, with equal earnestness, insist that, as to all matters which were not provided for in the Constitution, the people of the States remained, after the taking effect of that instrument, to all intents and purposes, as sovereign and independent as they were before its adoption. Together the States with the United States form arcs of a circle in which neither occupies the same space as the other, but each is a complement to the other. In this sense, Massachusetts is independent of Pennsylvania, New York of Ohio; and not only so, but each State is alike independent of the United States as it is of any of its sister States.

While, for instance, the United States are bound by the Constitution to guarantee to each State a republican form of government, and, under certain circumstances, to protect her from domestic violence, they could not fix how often the Legislature of New York should be convened, nor what should be the jurisdiction of any court which Maryland might see fit to establish, nor what should be the tenure of the offices she created.

The system of our Federal and State governments, when thus viewed, though at first sight complicated, becomes, when analyzed, simple, intelligible, and easy to be defined, while in its action it has been found to be harmonious, efficient, and consistent in its parts.

And may I not be permitted to add that any attempt to effect a material change in any other provision of the Constitution by means of a convention of the States, in the present temper of the times, is alike impracticable and uncalled for? Strike out of the instrument every provision which relates to slavery, and substitute therefor a simple declaration of its utter annihilation in all the States, and what considerable amendment does the Constitution need? Under it the country has prospered as no other country has ever done before, notwithstanding the disturbing element of slavery which it contained. Strike out that, and has not the country every assurance it can reasonably ask that it has a future before it more glorious even than the progress which has signalized the history of the past?

Results reached by the Discussion.

The discussion to which the consideration of these questions has given rise has been extended far beyond its intended limits, and may be summed up in its results in the following propositions, viz. —

1. The ultimate sovereignty of both the United States and the States resides in the people, respectively, of these bodies politic.

2. The governments of these respective bodies politic, whatever may be the powers delegated to them, are essentially the agents only of those in whom such ultimate sovereignty resides.

3. The *people* of the United States, in coöperation with and by the approbation of the several States acting in their political capacity, adopted the Federal Constitution as an act of the people of the United States collectively, and thereby conferred upon and delegated to the government thereby created the powers of sovereignty and independence in respect to all matters included in, or necessarily implied by, the terms of that instrument.

4. In respect to all other matters, the several States remain as

they were before the adoption of this Constitution, in the possession and exercise of the powers of sovereignty and independence.

5. No State, in its capacity of a body politic, can be in or out of the Union, as a political organization, except so far as the circumstance may make it so that its people form a part of the people of the United States.

6. No State can, by its government, through any inherent power which it possesses, make war upon the United States, nor can it be made amenable to punishment, confiscation or curtailment of its constitutional prerogatives, by the acts of its individual citizens.

7. The individuals constituting the people of the several States are amenable, as people of the United States, to the government of the latter, for the violation of any of its laws, or acts of treason or rebellion committed by them against it.

8. But Congress has no power to exclude a portion of these individuals, by the way of punishment, from the rights and privileges of citizens, for acts done, war levied, or treason committed, by others than themselves within the States in which they reside.

9. No citizen can be declared guilty of treason or acts whereby his rights as a citizen shall be forfeited, except upon conviction "by due process of law." And whenever the citizens resident in any State, not so convicted, shall see fit to unite, in good faith, in the exercise of any of the rights or franchises recognized as belonging to American citizens, by the provisions of the Constitution, there is no power in Congress to prohibit or restrain them.

10. If the people of the United States are unwilling that the States should any longer maintain the institution of slavery within their borders, they may, in the mode pointed out by the Constitution, change its provisions, so as to emancipate such as are now slaves, and render slavery forever unlawful therein. And this is the only way in which, in a time of peace, the people of the United States can act upon slavery as a local institution within any of the States.

11. And, finally, if those now in rebellion will lay down their

arms and resume the duties of peaceable citizens in good faith, the Union would, by such an act, be substantially re-formed; and Congress, following the manifest wish of the requisite proportion of the people of the States, having taken the initiatory step towards their action for hereafter excluding slavery from all the States, little legislation can be necessary to give back to the people of the United States the benefits and blessings of the Union, with more than its primitive power and vitalizing influence.